IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2005 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

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BHARAT YATRA SANGH

Versus

STATE OF GUJARAT & ORS.

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Appearance:

MR JP PATEL for Petitioner

MR NIGAM SHUKLA for Respondents

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CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision:27/09/96

C.A.V. JUDGMENT

Heard learned counsel for the parties.

2. The petitioner, a registered partnership firm, filed this petition before this Court questioning thereby the orders made by the respondent authorities under the provisions of the Bombay Motor Vehicles (Taxation of Passengers) Act 1958, (hereinafter referred to as the `Act 1958').

3. The petitioner was holding a regular permit No.T.V.7 issued u/s.63(7) of the Motor Vehicles Act 1939, (hereinafter referred to as the `Act 1939'). Under this permit, vehicle No.GTX 3208 was covered. The respondent No.2 is the prescribed authority u/s.11 of the Act 1958 read with Bombay Motor Vehicles (Taxation of Passenger) Rules, 1958 to entertain and adjudicate appeals against notice of demand issued to permit holder in prescribed form No.VI. The respondent No.3 is the tax officer appointed by the State Government under clause (9) of Section 2 of the Act 1958 for the area of Rajkot region. The petitioner submitted returns prescribed under Rule 4(2)(a) in form II, Rule 4(2)(c) in form IV and maintained form VIII prescribed under rule 13(2) of the Rules 1958, for the period from 1.6.81 to 31.3.82, which were considered to be incorrect by respondent No.3 under Section 6(b) of the Act 1958. The respondent No.3 called upon the petitioner by giving a notice in prescribed form No.V under Rule 8 of Rules 1958 to produce relevant material and evidence to prove that the returns submitted by it were correct. The petitioner, in response to the said notice, appeared before respondent No.3 and produced relevant evidence. The respondent No.3 issued notice of demand in form No.VI dated 16.12.83 demanding payment of tax of Rs.77,173.50 for the period from 1.6.81 to 30.4.82 and the penalty of Rs.19,294.50, totalling to Rs.96,468.00. The petitioner, being aggrieved of the aforesaid demand of tax and penalty, preferred an appeal before the respondent No.2 u/s.11 of the Act 1958 read with Rule 12 of Rules 1958. The Appellate Authority, under its judgment dated 9.3.84, which is stated to be received by the petitioner on 14.3.84, rejected the appeal. Hence this Special Civil Application.

4. The respondent No.2 filed affidavit-in-reply to this Special Civil Application and contested the claim of the petitioner.

5. The learned counsel for the petitioner contended that the respondents have committed serious illegality in treating it to be a case of permit of "stage carriage". It is not a case of stage carriage, but it is a case of permit of "contract carriage" and as such whatever fare charged by the `hirer' of the vehicle could not have been taken to be a fare for the purpose of levying of passenger tax thereon under the provisions of the Act 1958. It has further been contended by the learned counsel for the petitioner that under sub clause 10 of Section 2 of the Act 1948, it is provided that the words and expressions used but not defined in the Act 1958

shall have the meaning assigned to them in the Motor Vehicles Act 1939 and the Rules framed thereunder. The term, "contract carriage" has not been directly defined under the Act 1958 and though under the Act 1958 in the definition of "stage carriage" it has been stated that it includes such carriage or other Omni bus when used as contract carriage within the meaning of the Act 1939, but this distinction has not been drawn by the respondents while deciding the matter against the petitioner. Lastly it is urged by the learned counsel for the petitioner that the term `fare' defined in clause 6 of Section 2 of the Act 1939, includes sums payable to season ticket or in respect of hire of a contract carriage. So the fare which has been paid to M/s.Travel Vel, who has taken vehicle of petitioner on contract, by the passengers to be travelled in the petitioner's bus could not have been taken to be a fare paid to the petitioner. What actually M/s.Travel Vel paid to the petitioner is hire of vehicle of the petitioner and the same should have been taken to be fare received by the petitioner for levying of passenger tax, under the Act 1958. The petitioner has rightly shown that amount as fare received in Returns submitted by it from time to time.

6. On the other hand, the learned counsel for the respondents contended that it is not a case of contract carriage, but in fact it is a case where the petitioner has, in contravention of terms of permit which has been granted in its favour by the authority, used the vehicle as "stage carriage. The petitioner was plying the vehicle as stage carriage in between Rajkot to Mumbai and vice-versa. The passengers were taking individual tickets and boarding in the bus. The M/s.Travel Vel was only an agent of the petitioner. The M/s.Travel Vel was making booking of the tickets of passengers to be travelled from Rajkot to Mumbai in the petitioner's vehicle and as such, it was a case of agency but not a case of any contract of hire of vehicle by the said travel agency from the petitioner. The petitioner has not produced any material on record to show and establish that the M/s.Travel Vel was the hirer of the vehicle. Otherwise also, it is difficult to believe the same for the obvious reason that it was a regular feature and the vehicle was plied everyday on the route. What was arrangement in between the petitioner and M/s.Travel Vel Vel has not been brought on record. The learned counsel for the respondents further contended that though M/s.Travel Vel was called upon by the taxation authority to produce relevant record before it, but it has not appeared and evaded production of record. The petitioner, on the other hand, has also not produced any

record and only on the basis of what it is stated, emphasis has been laid down to accept it to be a gospel truth. From the checking reports made from time to time by the officers of the department, it comes out that it is a case where the fare was charged from the passengers by the petitioner through M/s.Travel Vel more than what it has been shown as a fare for the purpose of levy of tax thereon in the returns and both the authorities have rightly not accepted it to be a correct figure. It is a case of evasion of tax by the petitioner by a device for which there is no legal sanctity or any factual foundation. The learned counsel for the respondent lastly contended that it was a case where M/s.Travel Vel was acting as a travel agent of the petitioner and on fare which it collected from the passengers to be boarded in the petitioner's vehicle for travelling from Rajkot to Mumbai, the petitioner would have been paying it some reasonable commission.

7. I have given my thoughtful considerations to the submissions made by the learned counsel for the parties.

8. It is not in dispute that from the passengers, an amount of Rs.80/- towards fare for the period 1.6.81 to 31.12.81 and an amount of Rs.100/- towards fare for the period from 1.1.82 to 30.4.82, per passenger, was recovered.

9. The learned counsel for the petitioner does not dispute that no document of hiring of the vehicle of the petitioner by M/s. Travel Vel had been produced on record either by it or by M/s.Travel Vel.

10. From the order of respondent No.3, tax officer, it transpires that notice has been given from time to time for producing the copy of agreement entered into by the petitioner with M/s.Travel Vel. Under the letter dated 2.7.83, as it is revealed from the order of respondent No.3, partner of M/s. Travel Vel, Shri Dhirendra D. Gorasia declined to produce the accounts. The respondent No.3, under its letter dated 28th June, 198 asked M/s. Travel Vel to produce copy of lease agreement and account books and as stated earlier, that firm has declined to produce both the documents. From the order of respondent No.3, impugned in this writ petition, it transpires that Shri Dhirendrabhai was the partner of M/s. Travel Vel.

11. From the document which has been produced from the side of department in the form of checking report and control charge, the respondent No.3 found, as a matter of

fact, that the firm was booking the tickets for the bus of petitioner. The contention of the learned counsel for the petitioner has rightly been repelled by both the authorities that the firm M/s. Travel Vel was a hirer and not an agent. The petitioner has not come up with the case before respondent No.3 that the permit and vehicle was given on contract to M/s. Travel Vel to ply it regularly in between Rajkot and Mumbai and vice versa. It is also not a case of the petitioner that by long term agreement of hire of the vehicle the petitioner had given the said vehicle to M/s. Travel Vel on hire. The petitioner has also not produced any document of hire of the vehicle on the date on which the same has travelled in between Rajkot and Mumbai and vice-versa on the basis of booking which has been made by M/s. Travel Vel. The way and manner coupled with the facts which have come on record gives out that it is case where the petitioner has plied the vehicle at a relevant time in between Rajkot and Mumbai and vice-versa as stage carriage. The substance of the matter has to be considered and not the technicality. Even if it is presumed, for the same of argument, that the hirer of the vehicle was M/s. Travel Vel, then too, how it can be accepted that whatever amount was shown in the return by the petitioner as hire of the vehicle paid by M/s.Travel Vel to it, was correct. Conveniently, the petitioner has not produced any agreement entered into in between them or their arrangement or any account books of M/s.Travel Vel so that the correctness of the amount which was adjusted or paid as hire of the vehicle of the petitioner by M/s. Travel Vel can be established. Evasion of tax by the petitioner cannot be permitted by having such device for which there is no legal sanction or factual foundation. It is a case where the petitioner was plying its vehicle as stage carriage and M/s. Travel Vel was acting as its booking agent. A booking agent may be a travel agency, will not become hirer of the vehicle only on the basis of what the petitioner has alleged and stated. This is a question of fact. It is true that the petitioner's vehicle was covered under contract carriage and normally it has to be plied on the basis of hire agreement and anybody could have hired it, but the fact that the vehicle was regularly plied in between Rajkot and Mumbai, the possibility of this arrangement to avoid full payment of tax cannot be excluded. The learned counsel for the petitioner has put much emphasis on the fact that M/s. Travel Vel was not recognized agent under the provisions of the Motor Vehicles Act, and as such, it could not have acted as a travel agent. I do not find any substance in this contention. M/s.Travel Vel was not a registered travel agent under the provisions of the Motor Vehicle

Act, but it has acted as a booking agent for the petitioner's bus. So it acted in contravention of the provisions of the Motor Vehicles Act, 1939. M/s. Travel Vel was not a registered agent under the provisions of this Act and therefrom no inference can be drawn, much less in favour of the petitioner that it was hirer of the vehicle. The vehicle has been plied in true and correct sense and spirit as a stage carriage, that is another contravention which has been made by the petitioner and its permit could have been cancelled. There is no dispute that ultimately the permit of the petitioner has been cancelled u/s.60 of the Act 1939 for contravention of the terms of permit. The incidence of tax is on the fare paid by the passengers who have travelled in both the cases, i.e. stage carriage or contract carriage. No documentary evidence has been produced, as stated earlier, for hiring of vehicle and as such, in absence thereof, the authorities below have committed no illegality whatsoever to accept that the fare which has been charged from the passengers by M/s. Travel Vel is the real fare for levying of passenger tax for the period in question in respect of the vehicle of the petitioner. To a certain extent the petitioner's counsel is correct that the amount has not been paid directly by the passengers to the petitioner, but it is a case where the agent of the petitioner, has collected this amount. The respondent No.3 has put a straight question to the counsel who was appearing for the petitioner that whether the fare which has been disclosed in the return by the petitioner for the relevant period is reasonable or not. He was unable to give satisfactory reply. The reasonable fare has not been defined in the Act and the taxation officer has to ascertain what reasonable fare would have been in a given case. The return which has been given by the petitioner is not final. Under the Act 1958, and particularly Section 6, 7 and 13 thereof, wide powers have been given to the taxation officer to make assessment of passengers tax to be levied. In case the contention of the petitioner is accepted that whatever the contract carriage permit holder gives to be a fare received, in the return filed should be accepted, then the provisions of Sections 6, 7 and 13 of the said Act would become redundant. It has been found, in the present case as a fact, that the petitioner's tourist vehicle had been regularly used in between Rajkot and Mumbai by collecting separate fare from each individual passengers boarded at the rate as given above. In the return, the petitioner has shown the fare charged by it for plying its vehicle in between the aforesaid two stations less than what amount has been charged from the passengers, and the same has rightly not been accepted

and notice has been given for determination of passengers tax for the relevant period. The learned counsel for the petitioner has tried to draw distinction in between hire of vehicle and the fare paid by the passenger, but that distinction may be there in particular case, but each case has to be decided on the basis of its own facts. In the present case, as stated earlier, on the facts as found by the authorities, are sufficient to reach a conclusion with satisfaction that the fare charged from the passengers was the fare which has to be shown in return and not what the petitioner has alleged to be taken from M/s.Travel Vel. I am also satisfied that the amount which has been determined as tax charged from the passengers is reasonable amount of fare and the petitioner has rightly been held to be liable for the payment of difference of fare as shown in the return and what actually found received by it for the period in question. The definition of `fare' is inclusive. As per Section 2, sub clause 6 of the Act 1939, `fare' "includes sums payable for a season ticket or in respect of the hire of a contract carriage". As per Section 2 sub clause 3, the term "contract carriage" means, "a motor vehicle which carries a passenger or passengers for hire or reward under a contract expressed or implied for the use of the vehicle as a whole at or for a fixed or agreed rate or sum -- (i) on a time basis whether or not with reference to any route or distance, or (ii) from one point to another, and in either case without stopping to pick up".

12. In the "contract carriage" though as per the definition given under the Act 1939, the passenger may pay separate fare but the petitioner has not produced any document or any cogent evidence for a contract, express or implied, in between it and M/s. Travel Vel, for a fixed or agreed rate or sum. The contract may be express or implied, but on record no evidence whatsoever is available from the side of petitioner to show any contract in between it and M/s. Travel Vel. Even M/s.Travel Vel has not cooperated in proceedings and has declined to produce all relevant documents, i.e. contract agreement or account books. The petitioner has also not produced any evidence to prove express or implied contract and for non production of material evidence, adverse inference has to be drawn against it. In absence of any material on record, the authorities below have rightly reached to a conclusion that it is a case where M/s. Travel Vel has acted as a booking agent of the petitioner for which there may be some arrangement for payment of some commission, to which we are not concerned in the present case. It is not the case of the

petitioner that there is some other Act for levy of tax of the passengers who have travelled by contract carriage. Levy of taxation of passengers for such vehicles is also under the Act 1958. The definition of the stage carriage given in the Act 1958 is sufficiently wide which includes contract carriage. Section 6 of the Act 1958 empowers the tax officer to determine the sum payable to the State by the operator by way of tax where return submitted by the operator for any month or portion thereof appears to be incorrect or incomplete. Section 7 of the Act 1958 gives powers where whole or any portion of the tax leviable under the said Act for a given period has escaped assessment to assess the tax. Under Section 13 of this Act, the tax officer is empowered to require any operator to produce such accounts, registers and documents and to furnish information regarding the stage carriage or the fare collected in respect of passengers travelling therein as one specified in the order. Under Section 13, M/s.Travel Vel may not be called upon to produce the documents, but the petitioner certainly could have been and it has to produce all the relevant documents in support of the case with with it has come before the authority. The petitioner has not produced any document of M/s.Travel Vel. Section 66A of the Act 1939 provides that, "no person shall engage himself -(i) as an agent or canvasser, in the same of tickets for travel by public service vehicles or in otherwise soliciting custom for such vehicles, or (ii) as an agent in the business of collecting, forwarding or distribution goods carried by public carriers-- unless he has obtained a licence from such authority and subject to such conditions as may be prescribed by the State Government...". Section 123A of the Act 1939 provides punishment of agents and canvassers without proper authority.

13. As stated earlier, though nothing has been produced on record that M/s.Travel Vel was a licenced agent u/s.66A of the Act 1939, but a firm or a person who has acted as an agent in contravention of Section 66A of the Act 1939, leaving apart that it may be prosecuted and punished for the same, atleast it will not be considered to be a hirer of the vehicle. The petitioner cannot be allowed to take benefit of this contravention. Now the only question remains to be decided is whether the amount which has been charged by the petitioner through its agent from the passengers who have travelled from Rajkot to Mumbai and vice-versa at the relevant time, was a reasonable fare or not. At one point of time, I thought of remanding the matter on this question because I have some thinking in my mind that the amount which has been

charged by the petitioner through its agent M/s.Travel Vel, may include the commission paid to M/s.Travel Vel. But as the petitioner has not produced any documentary evidence in the form of accounts etc. and secondly as the petitioner has to pay this commission from its profits and as it cannot be excluded possibly from the fare amount for levy of tax thereon, I do not consider it to be appropriate to remand the matter back to the authority.

14. Taking into consideration the totality of the facts of the case, I am satisfied that it is a case where the petitioner has not disclosed in the return, the actual amount of fare which it has received. This case clearly falls under Section 6 of the Act 1958. The petitioner has submitted incorrect returns and as such after giving notice to it, the sum payable to the State Government by the petitioner by way of tax during the relevant period has to be determined. The amount of fare which has been determined in the present case cannot be said to be unreasonable. In the result, this Special Civil Application fails and the same is dismissed. Rule is discharged. Ad-interim relief granted by this Court stands vacated.

15. Under the order dated 23rd April 1984, recovery of the demanded amount of passenger tax has been stayed on condition that the petitioner shall pay Rs.40,000/within a period of one month and furnish security for the balance amount. Now in terms of the aforesaid interim relief, recovery of the balance amount remained stayed for all these years. The petitioner has made use of this amount for all these years as this Court has granted stay order. The respondent could not recover this amount. Taking into consideration this fact, I am of opinion that the State exchequer should not suffer any loss and the petitioner should pay the interest on this amount from 23rd April, 1984 till this amount is paid. The petitioner is directed to pay interest on this amount at the rate of 12% p.a. The petitioner is further directed to pay Rs.1,000/- by way of costs of this petition to respondent No.3.

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(sunil)